# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ERIK BLAIR WILLIAMS,<br><br>Appellant. | ) | DIVISION ONE<br><br>No. 63639-1-I<br><br>UNPUBLISHED OPINION<br><br>FILED: March 1, 2010 |

Dwyer, J. — During Erik Williams' trial for second degree assault, his counsel sought to impeach the victim with evidence of a prior inconsistent statement. When the court ruled that the victim had to be afforded an opportunity to deny or explain the statement, defense counsel dropped the matter. Williams appeals his conviction, arguing that counsel's failure to impeach the victim with his inconsistent statement amounted to ineffective assistance of counsel. Because Williams has not demonstrated deficient performance or prejudice, and because his other arguments lack merit, we affirm.

## FACTS

On August 22, 2008, co-workers Erik Williams and Ky Dewald attended a Mariner's game together. They drank alcohol at the game and at a restaurant

following the game. They ended the evening at Williams' townhouse where they drank more alcohol and played a video golf game with Williams' roommate, Nick Weaver.

Dewald testified that after playing the game for awhile, he stepped outside for a cigarette. When he returned, Williams pushed him in the shoulder toward the couch. Dewald leaned into Williams to keep from falling over. He then reached for the game controller and Williams pushed him onto the couch. Dewald thought all of this was "roughhousing, just kind of joking around."

Dewald stood up and was walking past Williams when Williams suddenly tackled him from behind, bringing Dewald to his hands and knees. Williams immediately put his arm around Dewald's neck and applied a choke-hold. Dewald could not breathe and attempted to shake Williams off but the choke-hold got tighter. On the verge of passing out, Dewald managed to pull Williams' arm away from his neck. He then rolled onto his back, gasping for air. Williams immediately and repeatedly struck Dewald in the face with closed fists. Dewald suffered a fractured cheek bone and an entrapped eye. The latter injury required surgery and a permanent implant to support his eye.

On cross-examination, defense counsel confronted Dewald with his initial statement to police. In that statement, Dewald said Williams' right arm was around his neck and that "[a]ll of a sudden, [Williams] socked me in my face on the right side of my cheek." Defense counsel pointed out that the statement

never mentions that Dewald broke free of Williams' right arm and rolled onto his back before Williams hit him. Counsel then asked "so it would have been [Williams'] left hand" that punched a face-down Dewald in the right cheek. Dewald denied that scenario. He also denied falling onto or hitting Williams.

On re-direct, Dewald testified that his initial statement to police was less detailed than subsequent statements. The prosecutor then referred Dewald to his second statement to police. In it, Dewald stated that he broke free of Williams' choke hold and rolled over before Williams struck him.

At the conclusion of his cross-examination, defense counsel reserved the right to recall Dewald.

Dewald's girlfriend, Maris Rochlin, testified that Nick Weaver phoned her shortly after the incident. When she arrived at the scene, Dewald was crying. His face was swollen and bloody. Williams appeared uninjured. Rochlin described him as "nonchalant" and sitting "very calmly" on the couch. Rochlin asked Williams, "how could you do this?" Williams did not respond. Rochlin then said, "look what you've done. How could you have done this to him?" When Williams did not respond, Rochlin slapped him. Williams said nothing. Rochlin could see no injuries on Williams.

Detective Mike Mellis testified that he arrested Williams five days after the incident. He examined Williams' hands, neck and face. He found no injuries.

The defense called two witnesses—Williams and his roommate Nick

Weaver. Prior to Williams' testimony, defense counsel attempted to introduce extrinsic evidence to impeach Dewald's testimony that he never hit Williams. When the court ruled that Dewald had to be given an opportunity to deny or explain the statement, defense counsel expressed his disagreement and did not pursue the matter further.

Williams testified that he was sitting in a chair when Dewald came back inside from his cigarette break. As Dewald climbed over a coffee table, he fell onto Williams' back. Williams conceded that this contact could have been accidental. Williams pulled Dewald over his shoulder. As he did so, Dewald's arm came up and his open hand struck Williams' face. Williams conceded that this contact could also have been accidental.

Williams then attempted to "control" Dewald as they wrestled on the floor. Weaver told them to stop, and Williams released Dewald. When they stood up, Dewald punched Williams in the face. At that point, both men threw punches. Williams struck Dewald's face four or five times. Williams conceded that, in retrospect, he may have overreacted. He also conceded that except for a sore jaw, he had no other injuries. On cross-examination, Williams admitted he had prior convictions for theft, multiple counts of identity theft, possession of stolen property, and taking a motor vehicle without permission.

Nicholas Weaver testified that he and Williams were roommates and business partners and had been friends since high school. He echoed

Williams' version of the incident. He admitted on cross-examination that he too had convictions for theft, identity theft, and possession of stolen property.

A jury convicted Williams of second degree assault. The court imposed a standard range sentence. Williams appeals.

**DECISION**

Williams first contends the trial court erred in giving the jury a "first aggressor" instruction.[1] A court may give an aggressor instruction if there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense. State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). The instruction is particularly appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. Riley, 137 Wn.2d at 910; State v. Cyrus, 66 Wn. App. 502, 508-09, 832 P.2d 142 (1992). Williams contends the instruction was improper in this case because there was no "credible evidence of mutual combat or of Mr. Dewald responding with sufficient force to provoke the use of force in defense." This contention is meritless.

Dewald testified that the incident was innocent horseplay until Williams

[1] The instruction stated:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

choked him. Williams and Weaver testified that Dewald subsequently punched Williams in the face and that Williams only punched Dewald in self-defense. There was thus credible evidence for a jury to find that, after initial mutual horseplay, Williams choked Dewald until he retaliated. This was sufficient to support the first aggressor instruction.

Williams next contends his counsel was ineffective for failing to impeach Dewald with a prior inconsistent statement. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn. 2d 668, 705-06, 940 P.2d 1239 (1997). Prejudice occurs if, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance, and Williams bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. McFarland, 127 Wn.2d at 335-36.

Williams contends his counsel rendered deficient performance when he failed to impeach Dewald with evidence that he "expressed hitting Mr. Williams first" during a conversation with James Dainard.[2] He claims counsel did not

[2] The record indicates that Dainard is an owner of the company that contracted with Williams and Dewald.

understand the procedure for impeachment under ER 613(b) and, as a result, the court "excluded" the evidence and the defense lost the opportunity to impeach Dewald. The State counters that defense counsel never lost that opportunity and simply made a strategic decision not to pursue it. Having reviewed the record, we conclude Williams has shown neither deficient performance nor prejudice.

To impeach a witness with a prior inconsistent statement under ER 613(b), the witness must be given an opportunity to admit or deny the statement and to explain it.[3] This can be done either before or after the extrinsic evidence is introduced. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003) (quoting State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998)). If the witness is not asked about the statement during direct or cross-examination, impeachment may still be accomplished at a later point so long as arrangements are made for the witness to be recalled. Horton, 116 Wn. App. at 915-16 (quoting Roger C. Park, et al., Evidence Law 536-37 (1998)). Here, neither side asked Dewald during direct or cross-examination about his alleged statement to Dainard. But defense counsel concluded his cross-examination by expressly reserving the right to recall him. This preserved his ability to impeach Dewald at

[3] ER 613(b) states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

a later point. Id.

On the last day of trial, defense counsel attempted to introduce the statement to Dainard without recalling Dewald. Counsel argued that because he had previously asked Dewald about who he gave statements to and whether he hit Williams, he was entitled to impeach Dewald's answers to those questions without recalling him. The State maintained that the defense could not call Dewald for the sole purpose of impeaching him and, in any event, could not introduce the impeaching statement without affording Dewald an opportunity to deny or explain it. Citing ER 613(b), the court ruled that the statement could not be introduced unless Dewald was afforded an opportunity to deny or explain it. Defense counsel said he disagreed with the court's ruling and made no further attempt to introduce the statement. Williams contends defense counsel's arguments demonstrate his misunderstanding of ER 613(b) and the absence of any strategic basis for his failure to impeach Dewald. He concludes, therefore, that counsel's performance was deficient. We disagree.

It is not at all clear on this record whether defense counsel misunderstood ER 613(b), or whether he was simply engaging in creative advocacy. What *is* clear, however, is that counsel decided it was strategically unwise to recall Dewald or to get into the question of whether the conversation with Dainard occurred. Counsel stated:

> I do not want to call Mr. Dewald in . . . my case in chief, I think that confuses the issue. . . . If we start to get into whether or not he had a conversation with Mr. Dainard, it becomes very confusing, and I

think [it] would confuse the jury.

Counsel's concern may have stemmed in part from indications that Dainard would have been unable to "provide a time where this conversation took place or any specifics about the conversation."[4] Defense counsel also knew that if asked about the statement, Dewald would likely either deny making it or explain that it merely referred to nonassaultive contact he initiated prior to Williams' attack. Thus, contrary to Williams' assertions, there appear to be strategic bases in the record for counsel's decision.[5] Williams has not demonstrated deficient performance or overcome the strong presumption of effective assistance of counsel.

Williams has also failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had counsel attempted to impeach Dewald. The record contains no declaration from Dainard indicating precisely what his testimony would have been. Given the evidence of accidental, consensual, and nonconsensual physical contact, the exact wording of Dainard's proposed testimony is critical in determining its value and potential effect on the trial.[6] In any event, it is clear that whatever Dainard would have said in court, the prosecutor intended to elicit that he could not remember when or where the alleged conversation took place. The impeachment was thus of

[4] The record indicates that this information came from defense counsel.

[5] This fact, as well the absence of prejudice discussed infra, distinguishes this case from State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003), a case cited by Williams.

[6] We note, as the prosecutor did below, that the State had no opportunity to interview Dainard and thus had no way of disputing defense counsel's offer of proof.

limited value. Considering the immense credibility problems of both defense witnesses and the strength of the evidence supporting the State's theory of the case,[7] there is no reasonable probability that the proposed impeachment would have affected the outcome of the trial.

Alternatively, Williams contends the court erred in "barring" the impeachment evidence because it was admissible under ER 613(b) in "the interests of justice" and because he was constitutionally entitled to present a complete defense. But the court did not bar the proposed impeachment. As discussed above, the court merely ruled that counsel could not impeach Dewald without giving him an opportunity to deny or explain the alleged statement to Dainard. Defense counsel elected not to pursue that strategy. Furthermore, Williams did not raise "the interests of justice" exception below and, in any event, the exception was designed for "unusual circumstances" not present here.[8]

Last, Williams contends the court violated the Sentencing Reform Act of 1981[9] and due process when it declined to impose a sentence below the

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[7] Williams' and Weaver's testimony was seriously undermined by their numerous crimes of dishonesty and the fact that Williams suffered no discernable injuries whatsoever. Notably, the trial judge stated at sentencing that the evidence was "overwhelming" that Williams was the only man fighting.

[8]The former comment to ER 613 provided in part that "[t]he rule affords a measure of discretion in 'the interests of justice' to allow for unusual circumstances such as a witness becoming unavailable by the time a prior inconsistent statement is discovered." Former ER 613 cmt. (2006). Though deleted in 2006, the comments to the evidence rules remain a "reliable guide to the drafters' original intent." 5 K. Tegland, Washington Practice: Evidence § 101.7, at 16 (5th ed. 2007).

[9] Ch. 9.94A RCW.

standard range based on his character and personal circumstances. This contention is controlled by State v. Law, 154 Wn. 2d 85, 97, 110 P.3d 717 (2005) (under the SRA, a sentence below standard range cannot be based on factors personal to the defendant) and Harmelin v. Michigan, 501 U.S. 957, 994-96, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (rejecting argument that constitution requires consideration of mitigating factors in non-capital cases); accord State v.

Cruz, 91 Wn. App. 389, 959 P.2d 670 (1998), reversed on other grounds, 139 Wn.2d 186, 985 P.2d 384 (1999).

Affirmed.

Dwyer, A.C.J.

We concur:

Leach, J.

Schindler, C.J.